REL: December 17, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-20-0300

Mitchell B. Doster

v.

State of Alabama

Appeal from Dale Circuit Court
(CC-18-45)

KELLUM, Judge.

Mitchell B. Doster was convicted of intentional murder, see § 13A-6-2, Ala. Code 1975, and was sentenced to life imprisonment.

The sole issue presented by Doster on appeal is whether the trial court erred in allowing the State to introduce as substantive evidence of his guilt his testimony from his pretrial hearing seeking immunity from prosecution on the basis of self-defense. We hold that it did not.

In the early morning hours of December 3, 2017, Ricky Dease was killed inside his mobile home in Dale County. The cause of Dease's death was determined to be multiple stab wounds to his arms, legs, torso, and neck, and a gunshot wound to his face that entered his left cheek and exited the back of his neck on the right side. Doster asserted that he was immune from prosecution because he had acted in self-defense, and he requested a pretrial hearing on the issue. See § 13A-2-23(d)(2), Ala. Code 1975. At the immunity hearing, Doster testified that he and his girlfriend, Celeste Conway, went to Dease's mobile home to collect $20 Dease owed Conway. Once inside, Dease gave them the money but then brandished a large knife and stabbed Doster in the stomach. Doster grabbed Dease's hand to avoid getting stabbed again and a fight ensued. The fight eventually ended up in the bedroom, with the two men falling to the floor. Doster testified that he called out to Conway for help and, as

Dease attempted to stab him again, he heard a gunshot and Dease fell on top of him. Doster said that he never saw a gun and that he did not know who shot Dease. He admitted that he likely stabbed Dease during the fight, but claimed he did so only to defend himself. We note that Doster's testimony at the hearing sharply conflicted with statements he gave to police while he was in the hospital and after he was released from the hospital.

The trial court denied Doster's request for immunity, and this Court subsequently denied Doster's petition for a writ of mandamus asking this Court to direct the trial court to grant him immunity. Ex parte Doster (No. CR-18-1191), 313 So. 3d 47 (Ala. Crim. App. 2019) (table).[1] At the beginning of trial and again the morning of the second day of trial, the State indicated that it intended to introduce into evidence during its case-in-chief Doster's testimony from the immunity hearing. Doster objected, arguing that his prior testimony was hearsay that did not fall within any

[1]This Court may take judicial notice of its own records. See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998), and Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992).

exception to the hearsay rule and that, at most, it would be admissible for impeachment if he testified at trial (which he did not) and if his prior testimony was inconsistent with his trial testimony. The State argued that because Doster was the defendant in the case, his prior testimony was admissible as substantive evidence of his guilt and not merely for impeachment. The trial court overruled Doster's objection. The State read Doster's prior testimony into the record and introduced into evidence a transcript of that testimony.

Doster argues on appeal, as he did at trial, that his prior testimony was hearsay that did not fall within any exception to the hearsay rule. However, "a statement offered against a party that is the party's own statement is not hearsay." Perkins v. State, 27 So. 3d 611, 613 (Ala. Crim. App. 2009). Rule 801(d)(2)(A), Ala. R. Evid., provides that "[a] statement is not hearsay if ... [t]he statement is offered against a party and is ... the party's own statement in either an individual or a representative capacity." Therefore, Doster's argument that his prior testimony was hearsay is meritless. We also reject Doster's argument that Rule 801(d)(2)(A) permits admission of a party's statement only if that

statement is inconsistent with the party's testimony at trial and is used for impeachment. Contrary to Doster's belief, Rule 801(d)(2) does nothing more than define a party's statement offered against that party as nonhearsay; it does not address the admissibility of that nonhearsay statement.

> "It is the general rule that a defendant who voluntarily takes the witness stand in his own behalf and testifies without asserting the privilege against self-incrimination, waives his privilege as to the testimony given and the same may be used against him in a subsequent trial for the same offense. Decennial Digest, Criminal Law, 406(4) and 539(2). This rule is so broad that even if the defendant does not take the stand at the second trial this does not prevent the use of his testimony at the former trial."

Willingham v. State, 50 Ala. App. 363, 367, 279 So. 2d 534, 538 (1973). The only exception to this general rule is " 'where the former testimony was given at a hearing where the accused was denied his right to the assistance of counsel, People v. Martin, 21 Mich.App. 667, 176 N.W.2d 470 (1970), or where the former testimony was "impelled" in order to rebut evidence introduced against the accused in violation of his constitutional rights. Harrison [v. United States, 392 U.S. 219, 322 (1968)].' " Whitehead v. State, 777 So. 2d 781, 821 (Ala. Crim. App. 1999), aff'd, 777

So. 2d 854 (Ala. 2000) (quoting Ashurst v. State, 462 So. 2d 999, 1008 (Ala. Crim. App. 1984)). Doster was not denied his right to counsel at the immunity hearing nor was his testimony at that hearing impelled by the improper admission of evidence obtained in violation of his constitutional rights. He voluntarily took the stand while he was represented by counsel to testify on his own behalf and, in doing so, he did not assert his privilege against self-incrimination.

We recognize that in Simmons v. United States, 390 U.S. 377, 394 (1968), the United States Supreme Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." However, a pretrial suppression hearing on a Fourth Amendment issue is not the same as a pretrial immunity hearing on the issue of self-defense. As one Florida court explained:

> "The United States Supreme Court has held that 'when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.' Simmons v. United

States, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). The Court reasoned that a defendant should not be forced to choose between asserting a Fourth Amendment claim and waiving the Fifth Amendment privilege against self-incrimination: 'In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.' Id.

"....

"Simmons does not, however, require exclusion of a defendant's pre-trial admissions where the defendant was not forced to surrender one constitutional right in order to assert another. See State v. Palmore, 510 So. 2d 1152, 1153 (Fla. 3d DCA 1987). In Palmore, the Third District held that a defendant's statements in a sworn motion to dismiss were admissible against the defendant at trial in the state's case-in-chief. Id. The court reasoned that because there is no constitutionally protected right to file a motion for dismissal, a defendant making admissions in a motion to dismiss is not forced to choose between two constitutional rights. Id. at 1154. The court found that Simmons was not applicable, explaining that Simmons was expressly limited to cases in which the exercise of a constitutional right conflicts with exercise of another constitutional right. Id.

"Similarly, as a general rule, a defendant's testimony at a former trial is admissible against the defendant at retrial, even if the defendant declines to testify at the retrial. State v. Billie, 881 So. 2d 637, 639 (Fla. 3d DCA 2004). ...

"Here, because appellant was not forced to make a choice between two constitutional rights, his testimony at the pre-trial Stand Your Ground immunity hearing was admissible against him at trial. Cf. Palmore, 510 So. 2d at 1153–54.

> Appellant was not required to surrender any constitutional right by voluntarily testifying in the pre-trial Stand Your Ground immunity hearing.
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> "To be sure, 'section 776.032 grants defendants a substantive right to assert immunity from prosecution and to avoid being subjected to a trial.' Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010). But this is not a constitutional right. Stand Your Ground immunity from prosecution is entirely a creature of statute. Because Simmons is limited to situations where the exercise of one constitutional right conflicts with the exercise of another constitutional right, the reasoning of Simmons should not be extended to any substantive right that may be created by statute or by rule.
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> "....
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> "This case does not present a reason to deviate from the general rule that a defendant's testimony is admissible against him in later proceedings. Any time a defendant exercises the right to testify at a criminal trial, he risks that his testimony could be used against him at any subsequent retrial. This case is far more analogous to Billie than it is to Simmons. Because a dismissal under the Stand Your Ground law is not a constitutional right, appellant was not forced to make a choice between two constitutional rights when he decided to testify at the pre-trial immunity hearing. His testimony was therefore admissible in subsequent proceedings."

Cruz v. State, 189 So. 3d 822, 828-29 (Fla. Dist. Ct. App. 2015). We agree that a pretrial immunity hearing is more akin to a prior trial than to a

pretrial suppression hearing and that, therefore, Simmons is inapplicable to a defendant's testimony presented at a pretrial immunity hearing.

The trial court did not err in allowing the State to introduce as substantive evidence of guilt Doster's testimony from his pretrial immunity hearing. Therefore, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and McCool, Cole, and Minor, JJ., concur.